IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

SHARLA VAN CLEVE, Plaintiff, vs. SOCIETY OF ST. VINCENT DE PAUL, PARTICULAR COUNCIL OF THE CITY OF DUBUQUE, d/b/a Society of St. Vincent De Paul,, DEFENDANT.	No. C03-1019 **ORDER**

This matter comes before the court pursuant to the following motions:

1. Defendant's March 10, 2005 motion to amend judgment to re-tax costs (docket number 107);

2. Plaintiff's March 11, 2005 bill of costs and motion for attorney fees (docket numbers 109 and 110, respectively); and

3. Defendant's March 17, 2005 bill of costs and motion for attorney fees (docket numbers 112 and 113, respectively.

In its March 10, 2005 motion, the defendant seeks to have the judgment amended to tax costs paid or incurred after October 22, 2004 to the plaintiff, which is the date that the defendant served upon the plaintiff an offer of judgment pursuant to Fed. R. Civ. P. 68 in the amount of $10,0000, whereas the plaintiff was only awarded $3,039 in damages by the jury's verdict on March 3, 2005. In its March 17, 2005 motions, the defendant seeks an award of attorney fees and costs, pursuant to Fed. R. Civ. P. 37(c)(2), based on plaintiff's failure to admit the truth of several matters

in two sets of Fed. R. Civ. P. 36 requests for admissions. As the "prevailing party" pursuant to 42 U.S.C. § 2000e-5(k), the plaintiff seeks an award of $89,701.10 in attorney's fees and expenses and $4,767.68 in costs. The court will first address the defendant's motions.

Offer of Judgment

Fed. R. Civ. P. 68 provides, in pertinent part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offered is not more favorable than the offer, the offered must pay the costs incurred after the making of the offer.

On October 22, 2004, the defendant served on the plaintiff an offer of judgment "in the amount of $10,000 (that amount including attorney fees), plus Court costs accrued to this date, as a full and final resolution of all of Plaintiff's claims against Defendant." Plaintiff did not accept this offer of judgment. On January 17, 2005, the defendant served on the plaintiff another offer of judgment, this one "in the amount of $16,000 (that amount including attorney fees), plus Court costs accrued to this date, as a full and final resolution of all of Plaintiff's claims against Defendant." Plaintiff likewise rejected this offer and the matter proceed to trial. The jury found that the defendant's refusal to restore her pay was done in retaliation for her filing a complaint with the Dubuque Human Rights Commission. The jury awarded the plaintiff $2,106.00 in back pay, $400.00 in emotional distress damages, and $533.00 for medical expenses, for a total of $3,039.00. The jury found

against the plaintiff on her constructive discharge claim, her gender discrimination claims, and declined to award punitive damages. On March 3, 2005 judgment was entered in the plaintiff's favor for "$3,039.00 together with interest and costs as provided by law."

Clearly, the damages awarded by the jury were less favorable than the defendant's offer of judgment. However, the plaintiff, as the prevailing party is entitled to a reasonable attorney fee as part of the costs, See 42 U.S.C. § 2000e-5(k), and the defendant's offers of judgment for $10,000 and $16,000 explicitly included attorney fees. See O'Brien v. City of Greeks Ferry, 873 F.2d 1115, 1118 (8th Cir. 1989) (noting that pre-offer attorney fees must be added to the offer of judgment in fee-shifting cases where the offer does not purport to include attorney's fees) (citing Marek v. Chesty, 473 U.S. 1, 6 (1985)). Since the defendant included fees in its offer amounts, plaintiff's fees as of the date of the offer do not serve to increase the amount of the offer. Thus, the issue in this case is whether, as of the date of the offers of judgment, the plaintiff's reasonable accrued attorney fees, plus her damage award, were less favorable than the offers, i.e., as of October 22, 2004, did plaintiff's reasonable attorney fees exceed $6,961.00, and as of January 17, 2005, did plaintiff's reasonable attorney fees exceed $12,961.00. Id. (concluding that trial court correctly denied plaintiff recovery of post-offer of judgment attorney's fees where the offer of judgment was greater than the actual recovery).

A review of the fee statements submitted in support of plaintiff's motion for award of attorney fees reveals that, as of October 22, 2004, plaintiff's accrued attorney fees were $33,487.32. As set forth below, the fees award as of October 22, 2004 exceeds $6,961.00, and it exceeds $12,961.00 as of January 17, 2005. Therefore, defendant's motion to amend the judgment to tax costs incurred after October 22, 2004 to the plaintiff is denied.

Federal Rule of Civil Procedure 37(c)(2)

Fed. R. Civ. P. 37(c)(2) provides:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorneys fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

The defendant served on the plaintiff 42 requests for admissions which, for the most part, requested that the plaintiff admit that she had no cognizable claim against the defendant. Understandably, the plaintiff refused to admit such matters. All of the plaintiff's claim survived summary judgment. There is no evidence that plaintiff's failure to admit was done in bad faith, or that she had no reasonable ground to believe that she might prevail on the matter. See Williams v. State Farm Mut. Auto. Ins. Co., 737 F.2d 741, 746 (8th Cir. 1984) (affirming district court's refusal to award fees pursuant to Fed. R. Civ. P. 37(c)(2) where district court rejected the contention that the failure to admit was done in bad faith and found that the defendant "had reasonable grounds to believe that he might prevail on the matter, or . . . [that] there was other good reasons for failure to admit."). The court further notes that many of the admissions involved matters of "no substantial importance." Accordingly, defendant's motion for fees pursuant to Rule 37(c)(2) is denied.

Attorney Fees

The court will now address the plaintiff's motion for an award of attorney fees. Pursuant to 42 U.S.C. § 2000e-5(k), the court, in its discretion, may allow the prevailing party a reasonable attorney fee as part of the costs. As set forth above, the plaintiff did prevail on one aspect of her Title VII retaliation claim, i.e., defendant's refusal to restore her pay in retaliation for her February 18, 2003 filing with the Dubuque Human Rights Commission. The jury awarded $2,106.00 in back pay, $400.00 in emotional distress, and $533.00 in medical expenses as a result. Plaintiff seeks a total award of $89,701.10 in fees and expenses.

Defendant resists plaintiff's motion for attorneys fees, arguing that either no fees, or greatly reduced fees should be awarded due to plaintiff's very limited success, failure to mediate in good faith, lack of billing judgment, excessive hourly rates by attorneys Heckmann and Davis, and billing for unnecessary or duplicative matters by attorneys Coyle and Grant. The defendant also requests that it be permitted to conduct limited discovery with respect to plaintiff's counsel's fees, but specifies nothing it is seeking to discover or why it should be permitted to do so. This request is denied.

In reply, plaintiff argues that settlement discussions are inadmissible at trial and should not be considered in determining fees. The plaintiff further argues that the issue she prevailed upon arose out of a common core of overlapping and intertwining facts, such that it would be impossible to separate counsel's time into successful versus unsuccessful matters, and improper to reduce the fee award as a result. Plaintiff also takes issue with defendant's argument of excessive time, noting that defense counsel utilized the majority of both the deposition time and the trial time.

In Title VII cases, the attorney fee award is usually calculated by multiplying the reasonable number of hours spent on the litigation by a reasonable hourly rate. This is known as the "lodestar" method. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Jensen v. Clarke, 94 F.3d 1191, 1203 (8th Cir. 1996); Casey v. City of Cabool, 12 F.3d 799, 805 (8th Cir. 1993). In determining the reasonable number of hours spent on the litigation,

unnecessary or redundant hours are excluded. The United States Supreme Court, in Hensley v. Eckerhart, set forth 12 factors to help guide courts in determining the loadstar. Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Hensley, 461 U.S. at 429-30 & n3. Taking into account these factors, the court will now decide upon the reasonableness of plaintiff's attorney fee request.

From March of 2003 until May of 2004, the plaintiff was represented by Douglas Q. Davis II and James Heckmann of James M. Heckmann Law Offices, P.C.[1] During their period of representation, Davis and Heckmann spent 82.4 hours on the plaintiff's case and accumulated $14,276.82 in fees. The billing statement from the Heckmann law firm and the summary of fees table reflects that attorney James Heckmann spent 20.4 hours on this matter at an hourly rate of, depending on the entry, either $200.00 or $204.00. Attorney Douglas Davis spent 53.5 hours on this matter at an hourly rate of, again depending on the entry, either $175.00 or $178.50. Presumably, a paralegal with the initials "SGM" billed 8.4 hours to this matter at a rate of $66.30 per hour.

An hourly rate of $200.00 or above for attorney Heckmann is not reasonable. No evidence has been submitted indicating that attorney Heckmann routinely charges $200/hour or that his clients pay this rate. Attorney Michael Coyle, who tried the case, charged $150.00 per hour. The court finds that to be a reasonable hourly rate for Heckmann as well. Likewise, an hourly rate of $175.00 or above for attorney Davis is not reasonable. Danita Grant, who very capably tried this case with Mr. Coyle, charged

[1]Davis' motion to withdraw was actually granted in January of 2004.

$120.00 per hour. Mr. Davis' time shall be compensated at the same rate. Regarding the hours billed by "SGM," the billing records of the Heckmann law firm show that .8 hours of SGM's time was actually spent pursuing the plaintiff's workers compensation claim, and .2 hours of SGM's billed time was spent scheduling the mediation hearing with the Dubuque Human Rights Commission, a purely clerical matter for which attorney fees are not properly awarded. Thus, SGM's time will be reduced by 1.0 hour. Taking into account these adjustments, the fees incurred by the Heckmann Law Offices, P.C. total $9,970.62. Reducing this amount by 30% to account for plaintiff's limited success, the fee award with respect to the services provided by attorneys Heckmann and Davis is $6,979.43.

Attorneys Coyle, Grant and their colleagues commenced their representation of the plaintiff on April 6, 2004. Through March 9, 2005, their fees totaled $73,887.75. They are also seeking reimbursement of $1,536.53 for long distance, postage Westlaw®, mileage, and travel expenses.

The hourly rates sought range from $75 for paralegals to $150 for the more senior partners, including Mr. Coyle. The court finds these rates to be reasonable. With respect to the hours spent, however, the court finds some duplication and redundancy that warrants reduction. A review of the billing statement also reveals that some of the functions for which attorney fees are being sought are clerical in nature, which is part of a law firm's overhead and not properly compensable.

For example, it appears that attorney Grant did the preparation for several of the depositions, and then both she and either Mr. Coyle or Mr. Henry attended the deposition. The court declines to award fees for two attorneys to attend depositions. Thus, the court will deduct 31.55 hours from attorney Grant's total hours for this duplication. See Kline v. City of Kansas City, MO Fire Dept., 245 F.3d 707, 709 (8th Cir. 2001) (affirming trial court's fee award, including a 15% reduction for "overlawyering").

A review of the billing entries also shows that some attorney time, as well as some paralegal time, was spent conducting clerical rather than legal tasks. Examples of such non-compensable tasks include scheduling depositions, securing court reporters, calendaring deadlines, and ordering transcripts. The court therefore reduces attorney Grant's time by 7.95 hours, paralegal MILK's time by 1.0 hours, paralegal NLM's time by 1.5 hours, and paralegal KEA's time by 9.6 hours.

The remaining compensable hours are:

PRODUCER	HOURS	RATE	TOTAL
DMH	7.2	$150.00	$1,080.00
MJC	186.1	$150.00	$27,915.00
MJS	28.4	$150.00	$4,260.00
DLG	260.7	$120.00	$31,284.00
NJW	24.75	$120.00	$2,970.00
BAK	2.4	$75.00	$180.00
KEA	.5	$75.00	$37.50
MILK	1.6	$75.00	$120.00
NML	5.25	$75.00	$393.75
			$68,240.25

As set forth above, the court must also take into account the fact that the plaintiff prevailed on only one aspect of her retaliation claim. The jury found that the plaintiff failed to prove that she was constructively discharged, or that the culmination of the restriction of the plaintiff's job duties constituted an adverse employment action. The jury further found that the plaintiff failed to prove her gender discrimination claim and declined to award punitive damages. See Id. (affirming 40% reduction to "reflect the plaintiffs' limited degree of success with respect to the case, i.e., a judgment in favor of only one of five plaintiffs who had variously alleged gender discrimination, race discrimination and

retaliation); Tyler v. Corner Constr. Corp., Inc., 167 F.3d 1202, 1204 (8th Cir. 1999) ("The proper amount of attorney's fees depends in part on the extent of the plaintiff's success; where the plaintiff obtained only 'limited' relief, the court may award only limited fees."); Wal-Mart Stores, Inc. v. Barton, 223 F.3d 770, 773 (8th Cir. 2000) (affirming reduction of 30% of requested fees where plaintiff prevailed on retaliation and harassment claims, but failed on her assault and battery, outrage, negligent retention, and constructive discharge claims).

While recognizing that much of the evidence and work involved in the various claims was intertwined and necessary to all of the claims, the court nevertheless concludes that some further reduction is necessitated due to the fact that the plaintiff was ultimately unsuccessful on the majority of her claims. The court finds that a further reduction of 30% is reasonable to account for plaintiff's lack of success. The attorney fee award with respect to the legal services provided by Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C. is $47,768.18.

Expenses

In addition to attorney fees, the plaintiff seeks an award of $1,536.53 in expenses for long distance ($4.29), "extraordinary" postage ($9.79), Westlaw® research ($384.74), mileage from Dubuque to Cedar Rapids for trial ($602.00), hotel and travel expenses ($511.20), and mileage from Dubuque to Platteville, WI to interview a witness ($24.51). Westlaw® research is not compensable. See Standley v. Chilowee R-IV Sch. Dist., 5 F.3d 319, 325 (8th Cir. 1993) (finding that "computer-based legal research must be factored into the attorneys' hourly rate, hence the cost of the computer time may not be added to the fee award"). Deducting the Westlaw® charges, the court finds the remaining expenses to be reasonable and awards $1,151.79 in expenses.

Bill of Costs

The plaintiff seeks reimbursement for the following items in her bill of costs:

Fees of the Clerk	$150.00
Service of summons and subpoena	17.00
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	3,441.49
Fees for witnesses	297.85
UPS Mailing from U.S. District Court of Juror List and Questionnaires	8.79
TOTAL	**$4,767.68**

Deposition expenses will not be taxed as costs unless: (1) the depositions were reasonably necessary for trial, and (2) the depositions were not solely for the purpose of discovery or investigation. Koppinger v. Cullen-Schiltz & Assoc., 513 F.3d 901, 911 (8th Cir. 1975). Three of the deponents for which reimbursement is sought did not testify at trial, i.e., Ruth Walsh ($146.20), Harry Blewett ($201.60), and Donald Walsh ($298.30). There has been no allegation or showing that these depositions were taken for any reason other than discovery or investigation. Deducting the these depositions, the court finds the costs as otherwise requested should be awarded, for a total of $4,121.58.

Upon the foregoing,

IT IS ORDERED that defendant's motion to amend judgment to retax costs (docket number 107) is denied, as is defendant's motion for attorney fees and bill of costs (docket numbers 112 and 113). Plaintiff's motions for attorney fees and costs (docket numbers 109 and 110) are granted as set forth in this order.

April 4, 2005.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT